

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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**APR 27 2015**

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner

v.

WAKE STONE CORP.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2010-0095-M  
A.C. No. 31-02071-197617

Mine: Nash County Quarry

## DECISION ON REMAND

Before: Judge L. Zane Gill

This case is before me upon remand by the Commission to determine an appropriate civil penalty for Citation Nos. 6512366 and 6512367.

On April 18, 2014, the Commission decided that Wake Stone Corp. (“Wake Stone” or “Respondent”) violated 30 C.F.R. § 56.14132(a) for both Citation Nos. 6512366 and 6512367 because the service horns on the Caterpillar 345B excavator and the Komatsu D65Px dozer were “not maintained in functional condition.” *Wake Stone Corp.*, 36 FMSHRC 825 (Apr. 2014). This now constitutes the law of the case. *See Pepper v. United States*, 131 S. Ct. 1229, 1250 (2011).

The undisputed material facts in this matter are as follows:

- On July 14, 2009, MSHA issued Citation No. 6512366 to Respondent at the Nash County Quarry.
- Citation Number 6512366 alleges a violation of 30 C.F.R. § 56.14132(a).
- The service horn on the Caterpillar 345 B excavator (Company Number 16052), which was located in the rock breaker area of the pit, was inoperative at the time of the inspection performed by MSHA on July 14, 2009.
- During the course of this inspection, the inspector requested to inspect the Caterpillar 345 B excavator that was not in operation during the course of the shift.
- Christopher Pons, the Superintendent of the Nash County Quarry, instructed that a pre-operation examination be completed before the equipment was operated and inspected.
- During the course of the pre-operation inspection, the operator conducting the pre-operation exam discovered that the service horn of the excavator was not properly functioning, and informed the MSHA inspector of this.

- The MSHA inspector issued Citation No. 6512366 because of the inoperable horn.
- On July 14, 2009, MSHA issued Citation No. 6512367 to Respondent at the Nash County Quarry.
- Citation Number 6512367 alleges a violation of 30 CFR 56.14132(a).
- The service horn on the Komatsu D65Px dozer, which was located in the pit area of the mine, was inoperative at the time of the inspection performed by MSHA on July 14, 2009.
- Also During the course of this inspection, the MSHA inspector requested to inspect the Komatsu D65Px dozer that was not in operation during the course of the shift.
- Christopher Pons again instructed that a pre-operation examination be completed before the equipment was operated and inspected.
- During the course of the pre-operation inspection, the operator conducting the pre-operation exam discovered that the service horn of the dozer was not properly functioning, and informed the MSHA inspector of this.
- The MSHA inspector issued Citation No. 6512367 because of the inoperable horn.

## Discussion

As the Commission has ruled that Wake Stone did violate 30 C.F.R. § 56.14132(a) for Citation Nos. 6512366 and 6512367, I must now determine the penalty amounts for each based on negligence and gravity. The MSHA inspector determined that the violations for Citation No. 6512366 and 6512367 were unlikely, lost workdays or restricted duty, non-significant and substantial, and low negligence.

Here, the two pieces of equipment, the Komatsu D65Px dozer and the Caterpillar 345 B excavator, were not in operation at the time the MSHA inspector was inspecting the mine. Since the pieces of equipment were not in operation, the Respondent required a pre-operational inspection to be completed before the equipment could be operated and inspected by MSHA. Only during the course of the pre-operational inspection, which is required before any piece of equipment is placed in operation, 30 C.F.R. § 56.14100(a), did the Respondent discover the horns were malfunctioning. As such, it is reasonable to infer that if the Komatsu D65Px dozer and the Caterpillar 345 B excavator were to be placed in operation, and any such defect would have been discovered before the equipment was operated and before miners were exposed to hazards. That is what happened in this case. These facts mitigate the Respondent's negligence. Therefore, I agree with the Secretary's assessment that an injury or illness was unlikely<sup>1</sup> and the operator's negligence was low.<sup>2</sup>

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<sup>1</sup> The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sep. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) and *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987)). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The

The purpose of a horn is to warn people and other equipment in the area. The lack of an operating horn makes a collision more likely to occur. Therefore, I agree with the Secretary that if an injury were to occur because of the failure of the excavator or dozer operator to sound the horn, the injury or illness would reasonably be expected to be lost workdays or restricted duty.

## Penalty

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess said penalty. 29 C.F.R. § 2700.28.

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator’s history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator’s ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) (“[N]either the ALJ nor the Commission is bound by the Secretary’s proposed penalties ... we find no basis upon which to conclude that [MSHA’s Part 100 penalty regulations] also govern the Commission.”); *See American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ Zielinski). Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

The proposed penalty for Citation Nos. 6512366 and 6512367 and is \$100.00 each. The operator has no relevant violation history for the fifteen months prior to the latest citation date. I have considered the size of the operator based on the operator’s report to MSHA’s data retrieval system. The gravity of the violation is unlikely to result in injury and the negligence is low. There was no indication that the operator would not be able to continue in business from a \$200.00 penalty. Additionally, the operator demonstrated good faith in abating the violation.

As such, I assess a penalty of \$100.00 for Citation No. 6512366 and \$100.00 for Citation No. 6512367.

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Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

<sup>2</sup> Low negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” 30 C.F.R. § 100.3(d).

**WHEREFORE**, it is **ORDERED** that Wake Stone pay a penalty of \$200.00 within thirty (30) days of the filing of this decision.



L. Zane Gill  
Administrative Law Judge

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